BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

In the Matter of	)	
	)	
	)	
Implementation of Section 25 of the Cable Television Consumers Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
	)	
Direct Broadcast Satellite Public Service Obligations	)	

To: The Commission

REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.

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PRIMESTAR Partners L.P. ("PRIMESTAR"), by its attorneys, hereby submits reply comments in response to the comments filed by other parties concerning the Notice of Proposed Rulemaking ("Notice") in this proceeding.[1/]

I. SUMMARY

Most of the parties' differences in the comments dealt with further defining the statutory obligations of DBS with respect to compulsory carriage of educational and informational programming: i.e., definitions of eligible programming and suppliers of that programming; determination and implementation of the requisite

1/ PRIMESTAR filed its opening comments in this proceeding on May 24, 1993.

amount of reserved channel capacity; the discretion of DBS operators to select and provide the required programming at their expense rather than through channel leasing to others; and determinations of the cost basis and the discount to certain program suppliers for any channel leasing for that programming.

PRIMESTAR finds merit in comments urging flexibility in the carving out of reserved channel capacity, and in the selection of and financial arrangements for the requisite educational and informational programming to fill it. For at least PRIMESTAR -- the only DBS programming operator that has filled its current, total channel capacity -- the "grandfathering" rule suggested by the Commission and fleshed out in PRIMESTAR'S opening comments remains valid.

The 50 percent-of-direct-costs discount prescribed by the statute for leased channel capacity should be recognized as applicable only to those entities meeting the narrow definition of "national educational programming supplier," while DBS programmers are free to provide a wider array of programming without charge to (or by payment to) program suppliers to meet the statutory requirement for "noncommercial programming of an educational or informational nature."

The commenters indicated fewer differences with respect to the Commission's proposals in its Notice to meet the statute's directives concerning political advertising and localism. In reply, PRIMESTAR differs with one party seeking an unreasonable local services requirement and two others offering overly broad

interpretations of "reasonable access."

Several parties expressed their views on the question of whether it is the Ku-band DBS satellite carrier licensed under part 25 of the Commission's Rules or the DBS video programmer that is the "provider of direct broadcast satellite service" for purposes of the obligations of the 1992 Cable Act.[2/] PRIMESTAR adheres to its opening comments defining DBS "provider" differently for Section 335's subsections (a) and (b), respectively. PRIMESTAR here explains further why it reads the statute to place the ultimate obligation to reserve channel capacity on the part-25 satellite carrier rather than a lessee DBS programmer.

Among commenting parties, there was no discernible disagreement with the Commission's reading of Congress' intent to exclude C-band satellite-to-home transmissions from all of the new statutory obligations.

II. DEFINITION OF PART-25 DBS SERVICE "PROVIDER"

Several commenting parties take positions agreeing or differing in one respect or another with the position of PRIMESTAR concerning the definition of a part-25 Ku-band "provider" (pp. 5-10). PRIMESTAR showed that the Cable Act, when two

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2/ All references herein to statutory provisions, unless otherwise indicated, are to Section 25 of this act, the Cable Television Consumer Protection and Competition Act of 1992. Section 25 amended the Communications Act of 1934 to add a new Section 335, 47 U.S.C. § 335.

relevant provisions are read together, gives the Commission no choice but to treat the part-25 DBS licensee (i.e., the satellite carrier) as the "provider" of DBS service, for purposes of the channel reservation requirements for educational and informational programming under Section 335(b) of the Communications Act. PRIMESTAR concluded (pp. 5-7), however, that, for purposes of the political advertising requirements of Section 335(a), the Commission has discretion in identifying the "provider" as either the satellite licensee or the video programmer.

The Association of America's Public Television Stations and the Corporation for Public Broadcasting ("APTS/CPB") (pp. 7-10) wrote that, for a variety of reasons stated in their comments, including limits on FCC regulatory authority imposed by the First Amendment, the better interpretation of the definitional section concerning a part-25 Ku-band "provider" is that it refers to the satellite licensee only.

language GTE Spacenet relies, did not include any definition of

applies to the satellite carrier, but not to a DBS programmer like PRIMESTAR.

It has been suggested to PRIMESTAR that the term "provision", in the phrase "provision, initial authorization, or authorization renewal for a provider of direct broadcast satellite service," could refer to a non-licensee. But that would require the first part of the sentence to be read as follows: "The Commission shall require, as a condition of any provision ... of direct broadcast satellite service...," when in fact the grammar of the sentence requires it to be read as follows: "The Commission shall require, as a condition of any provision ... for a provider of direct broadcast satellite service..." (emphasis added). Moreover, if the former reading was meant to give "provision" a more comprehensive meaning than licensing, there would have been no need for the subsequent references to FCC authorizations. Indeed, if satellite carrier licensees were not meant to be covered, why were "authorization" and "authorization renewal" specified in the statute?

These observations support PRIMESTAR's reading of the provision to limit the meaning of the term "provider" in subsection (b) to Commission licensees. The statutory command indirectly but unmistakably identifies the satellite carrier being licensed as the "provider" formally subject to these conditions and obligations.[3/]

3/ PRIMESTAR pointed out in its opening comments (pp. 6-7) that the carrier could negotiate with the DBS programmer for the latter to assume responsibility for fulfilling the carrier's obligations.

III. STATUS OF PART-25 DBS SERVICE UNDER THE ACT

In its comments (pp. 18-20), Continental Satellite Corporation urges that, after seven years, the Commission deny any and all authority for DBS service under part 25 with respect to Fixed-Satellite Service licensees. Continental offers no reason for the Commission to do this, other than its asserted but unsupported beliefs that the part 100 DBS permittees are the "real" DBS; that FSS services "are simply not equipped to serve as DBS operators" (emphasis in original); and that the "Gang of Nine" part-100 permittees should not have "interference" from C-band and Ku-band FSS operators.

Aside from its blatantly anti-competitive nature, devoid of any public interest rationale, Continental's proposal and explanation are in clear conflict with the new Section 335. That provision assumes and implicitly approves of the continued existence of DBS service by both part-25 and part-100 licensees and programmers. The public will benefit from the existence of additional competition in program service offerings, regardless of the radio frequencies on which they are received.

IV. EDUCATIONAL AND INFORMATIONAL PROGRAMMING OBLIGATIONS

A. Channel Reservation

Most of the commenters favored a flexible approach by the Commission in overseeing DBS fulfillment of channel reservation

requirements, permitting either use of discrete channels or

be permitted to reserve a percentage of capacity rather than specific channels if that is their choice.

In following the same position, DirecTv, Inc. states (pp. 18-21) that it intends to spread its educational and informational programming over several channels that are also to be used for other purposes. It proposes for this purpose a formula that will produce a requisite number of minutes, based on use of four-percent channel capacity use, rather than a number of whole channels dedicated for this purpose. PRIMESTAR believes that such a formula for multi-channel spreading of this programming obligation is consistent with the principle of flexibility that most of the parties have followed in their comments. This formula is not inconsistent with the discrete-channel formula proposed by PRIMESTAR.

This kind of flexibility, permitting the DBS operator to choose either the whole-channel approach or the spreading-over-channels approach, is preferable to the inflexible proposals of Hispanic Information and Telecommunications Network, Inc. ("HITN") (p. 17-18), for mandatory whole-channel use, and APTS/CPB (pp. 12-13), for mandatory blocks of time.

B. Grandfathering

In the Notice (¶ 40), the Commission raised the possibility of "grandfathering" existing program service arrangements and imposing channel reservation requirements only upon the expansion of service to include additional channels. HITN (p. 13) opposes

such grandfathering, stating that (1) noncommercial programmers would be paying a substantial amount of money for channel use and (2) DBS providers have had ample notice of the requirement of the channel-reservation provision "during the time they were putting together their programming lineup". HITN's first point is not a good reason for the Commission to interfere with the existing programming obligations of PRIMESTAR (either directly or, indirectly, by placing new channel reservation requirements on the satellite carrier licensee). HITN's second point, even if valid with respect to part-100 licensees not yet operating DBS video services, is certainly not valid with respect to PRIMESTAR, which was not on notice of these requirements when it put together its programming lineup. See PRIMESTAR Comments, p. 15.

APTS/CPB (p. 19) also opposes grandfathering, arguing, without indicating any statutory language or legislative history to support it, that the Commission should interpret the new statute as preempting existing contracts for DBS satellite capacity. The Commission should take the only reasonable course, in the absence of a congressional directive to the contrary, by adopting a rule grandfathering existing program arrangements.

C. Definition of Qualified Programming and Programmers

PRIMESTAR agrees with those commenters which read the statute as permitting satisfaction of the aforementioned carriage obligations through a wide array of qualified programming from a variety of suppliers (e.g., DirecTv, p. 22; Discovery, p. 9; Mind

Extension University, p. 5; SBCA, p. 21; Continental, p. 37; Green Sphere, p. 1). This is the interpretation of the statute which would best serve the public interest by tapping the greatest amount of educational and informational programming. This interpretation would in no way change the substantive meaning of "noncommercial programming of an educational or informational nature."[4/]

The limitation of eligible programming to that produced by a "national educational programming supplier" and its proposed implementation advocated by APTS/CPB (pp. 21-24) is contrary to the broader category of "noncommercial programming of an educational or informational nature" specified in Section 335(b)(1)&(2). Moreover, it is disserving of the public interest, inasmuch as high-quality educational and informational programming from program suppliers other than educational entities would be disqualified without any reason other than to favor a particular kind of program source.

HITN (pp. 17-19) asks that eligible programming be limited to that which is instructional and for credit at accredited schools,

obligations with programming supplied by entities with which they are affiliated. Consumer Federation of America ("CFA") (p. 17) reads the statutory prohibition on editorial control by the DBS provider to mandate an "absolute ban on any corporate relationship between the DBS operator and a qualified noncommercial programmer." APTS/CPB (p. 24) would prohibit any ownership relationship between the program supplier and the DBS operator that would give the latter de facto or de jure control of the former. HITN (p. 18) argues that DBS operators may not pick and choose at all, but should be bound by the already-mentioned lottery process that it proposes. CFA (p. 19) proposes a first-come, first-served requirement for access to channels that it says should carry this programming.

None of these proposals is required by the statute or designed to serve the public interest. Congress certainly knew how to address such concerns in the 1992 Cable Act, but chose not to bar any promising source of bona fide educational and informational programming.

CFA (pp. 23-24), while opposed to DBS operators dealing with affiliated program suppliers, supports the Commission's suggestion that DBS operators be permitted to discharge their obligation through educational and informational programming for which they are willing to pay, thus implicitly finding no obstacle in the "editorial control" prohibition of Section 335(b). PRIMESTAR agrees with CFA (p. 24) that "the Commission should encourage it [the payment option] in the name of high quality, diverse

noncommercial educational programming."

An affiliation between the DBS operator and the programming entity supplying the educational programming should not change the analysis, so long as the affiliated entity operates independently and provides bona fide noncommercial educational or informational programming. Indeed, APTS/CPB (pp. 24-25 & n. 21), while opposing commercial DBS operators' use of noncommercial programming from certain affiliated educational programming entities, sees no problem in a noncommercial educational programming entity serving as both DBS operator and educational program supplier while excluding all other educational programming.[5/] PRIMESTAR does not believe that constitutional and statutory law permit the discrimination urged by APTS/CPB in its differentiation between noncommercial and commercial DBS entities. Both kinds of programming distributors may lawfully select noncommercial educational and informational programming from an unlimited range of program sources so long as the individual programs meet the congressional directive for "noncommercial programming of an educational or informational nature."

D. Rates for Reserved Channels

The commenting parties split predictably between potential lessors and lessees of reserved channels in advocating broader or narrower definitions of the "direct costs" to be included in the

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5/ As stated above, APTS/CPB would limit its proposed prohibition to affiliations that would give the commercial DBS operator de facto or de jure control of the educational program supplier.

basis for setting maximum rates for leased access under Section 335(b)(3)&(4). PRIMESTAR reaffirms its opening comments (pp. 18-29) on the elements to be considered in the cost basis. The seriousness of the burden of the 50-percent minimum discount ordered by the Congress militates for the fullest cost accounting legally possible.

It is important that the Commission give a careful reading to Section 335(b) to apply the discounted rate, called for under paragraphs (3) and (4), only to those entities meeting the definition of its paragraph (5)(B) for "national educational programming supplier." These are the only entities entitled by law to the discounted rate. A policy of full lease rates, and/or payments by DBS operators to a broader range of program suppliers (see subpart C., above), may be followed by DBS operators in otherwise meeting their general obligation under paragraph (1) of the subsection to reserve channel capacity exclusively for "noncommercial programming of an educational or informational nature."

E. Unused Channel Capacity

Green Sphere (p. 1) argues that there is such an abundance of eligible programming that DBS providers should not be permitted to use reserved channel capacity during an interim period. Whether educational entities will rush to seek to lease the channel capacity set aside for this special use and how much other educational or informational programming is immediately available

for this purpose are not certain. In any event, what Green Sphere misses is the time that it will take DBS operators, after they know the specific requirements of the Commission's rules, to handle leasing requests and to otherwise obtain programming to meet those requirements.

As an initial matter, then, there should be a reasonable time period provided by the Commission before the carriage requirements become effective, during which time it would be lawful, under paragraph (2) of Section 335(b), for the DBS operator to fill that channel capacity with other programming. After that, it would depend in part on whether and when "national educational program suppliers" come forward to lease reserved channel capacity not being programmed by the DBS operator with paid-for noncommercial educational or informational programming.

With these factors in mind, PRIMESTAR recommends that DBS operators be permitted to use reserved channel capacity for other than this noncommercial programming (from either the DBS operator or lessees) until the later of (1) 180 days after the release of the FCC's governing rules; and (2) for the part of the reserved channel capacity affected by a lease to a national educational program supplier, until the leasing entity is ready to commence broadcasting of programming.

V. PUBLIC INTEREST REQUIREMENTS

A. Localism

Most of the commenting parties believe that local service by

DBS is infeasible, or at least premature in the absence of a satellite configured with spot beams as proposed in the business plan of LOCAL-DBS, INC. SBCA (p. 15 n. 1) foresees the possibility of "spot beam" local coverage from satellites, "some of which are on the drawing board," if DBS operators were to determine that the economics of the local or regional services they will market can support the cost of operating a satellite for limited audiences."

Despite the futuristic nature of such localized service, the National Association of Telecommunications Officers and Advisors and three other groups representing cities and counties ("NATOA") read Section 335 to command the Commission to adopt rules requiring DBS systems to provide a wide range of video and non-video services narrowed to the local level. Section 335 demands no such implementation, requiring only, in subsection (a), that the Commission "examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service."

The Commission was right in its Notice (¶¶ 31-36) to question the current technological and economic feasibility of local service by satellite transmissions reaching national audiences,

and the comments of parties other than NATOA either support[6/] or are consistent with[7/] the view that, whatever the future possibilities, the present reality does not permit mandatory local service requirements.

B. Political Advertising

Almost none of the commenting parties differed with PRIMESTAR on the proposition that DBS providers should not have to place political advertising on all or particular channels and should otherwise have broad discretion in fulfilling their Section 315 and Section 312(a)(7) obligations incorporated by reference in Section 335(a). CFA (pp. 25-26) appears to oppose broad licensee discretion in choice of channels for satisfaction of "reasonable access" obligations, but CFA's fear that "a DBS provider could relegate all political advertisements to unpopular times and channels to discourage use by candidates" can be assuaged by reliance on current standards applicable to cable television that would not interfere so drastically with DBS programming discretion.

DirecTv (p. 14), while stating that FCC rules should take account of the nationwide aspects of DBS, opines -- incorrectly, we believe -- that some races for Senate and House would be what

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6/ DirecTv (pp. 18-19); USSB (p. 8); Continental (p. 28); PRIMESTAR (p. 11).

7/ For example, in contrast to the position of NATOA, APTS/CPB (p. 335) states only that localism should be "encouraged,"

it calls "federal races of national importance" that could be subjected to the reasonable access requirements pertaining to candidates for federal elective office. PRIMESTAR opposes any such interpretation of Section 312(a)(7) in this context.

The Commission has never interpreted "reasonable access" to mean the carriage of candidates for House and Senate seats in broadcasts outside the areas in which they are running for office, no matter how nationally important the races. As stated in the Notice (¶ 24 n. 27) in this proceeding: "In its application of the reasonable access provisions in the context of national networks, the Commission has accepted that a request for time need not be honored unless the presidential candidate involved is qualified nationwide. Carter-Mondale Presidential Committee, 74 FCC 2d 629, 624 (sic) (1979). Pairing nation wide access with national candidates thus has some precedent."

The thrust of that FCC statement -- in observing that even a presidential candidate is not entitled to nationwide carriage unless he or she is found to be on the ballot in enough states to be considered a national candidate -- conflicts with DirecTv's suggested "national importance" standard for federal office contests within a single state. "Reasonable access" should be made available only to qualified national candidates for President and Vice President.

CONCLUSION

None of the commenters has successfully supported positions contrary to those taken by PRIMESTAR in its opening comments. Many of the parties that disagree with PRIMESTAR do so in a mistaken treatment, consciously or unconsciously, of DBS satellite providers as common carriers. Section 335 does not make such a drastic change in the broadcasting characteristics of DBS. Considering the tradition of vesting broad programming discretion in broadcast licensees and national network programmers, buttressed by First Amendment and statutory no-censorship protections, the Commission should interpret Section 335 so as to assure that the fledgling DBS industry has the opportunity to grow as a strong competitor in the free-enterprise system of mass media, thereby serving the public interest.

Respectfully submitted,

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July 14, 1993

CERTIFICATE OF SERVICE

I, Uma D. Redwine, hereby certify that a true and correct copy of the foregoing Reply Comments of PRIMESTAR PARTNERS L.P. was sent this 14th day of July 1993, by first-class U.S. mail, postage prepaid to the following:

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